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**Testimony on AB 232
Committee on Criminal Justice and Corrections
September 8, 2011**

Chairman Bies and colleagues of the Assembly Criminal Justice and Corrections Committee,

Thank you for holding this hearing and the opportunity to appear before you as the lead Assembly author of Assembly Bill 232, which would restore and strengthen statutory protection of the rights of crime victims and witnesses.

The Crime Victims Bill of Rights, adopted as an amendment to Wisconsin's Constitution in 1993, states that "*This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy*", while unfortunately omitting this provision when specifying enforceable "*privileges and protections*" provided to crime victims. The section further provides that the legislature shall "*provide remedies for the violation of this section.*"

An effort to fulfill this requirement was initiated through the creation of Wisconsin's Crime Victim Rights Board (CVRB), charged with investigating and enforcing violations outlined in Chapter 950 of the Wisconsin State Statutes and the Crime Victims Bill of Rights.

Unfortunately, in the 2005 *Shilling v. the Crime Victims Rights Board* Wisconsin Supreme Court case it was held by the court that the constitutional guarantee that victims be treated "with fairness, dignity and respect for their privacy" as described in statute 950 was only prefatory—a general statement of policy and not specifically enforceable— in other words, common sense sentiments enshrined in state statute and our state Constitution with no teeth behind them.

This unintended consequence was driven home earlier this year when my wife and I were sitting at home watching the evening news and were shocked to discover that former Calumet County DA Ken Kratz, a former chair of the Crime Victims Rights Board, had eluded both criminal charges and even so much as a formal reprimand from the state's Victims Rights Board.

As most in this room will recall, last September the public learned that then- District Attorney Ken Kratz sent a series of sexually harassing text messages to a domestic violence victim whose attacker Kratz was prosecuting. The victim in the case, Stephanie Van Groll, reported the unwanted text messages to the Kaukauna police department. Ms. Van Groll said she endured “three days of hell” while receiving the text messages and was afraid that if she rebuffed Kratz, her attacker might go free. Soon after news of Kratz’s conduct became public, several other crime victims he had re-victimized stepped forward with similar accounts, as it became apparent that Ms. Van Groll’s ordeal was part of a prolonged pattern of sexual harassment by the then- DA. Nor was there any recourse for the victimized women to the judges hearing the cases Kratz was charged with prosecuting against their abusers- giving his abuse of a position of great public trust even greater power over those he targeted.

I am pleased to be joined by Senator Van Wanggaard, the lead Senate author and himself a victim of crime, in introducing the Crime Victim Rights Preservation Act to restore meaningful protections for crime victims and simplify the process by which their rights may be enforced through the following modifications to Chapter 950:

1. Specify that crime victims and witnesses have the right to be treated with fairness, dignity and respect for their privacy by public officials, employees or agencies, and to be free from intimidation, harassment, discrimination, or abuse by public officials, employees, or agencies, while still respecting the right or duty of a public official or employee to conduct his or her official duties in a reasonable and proper manner.

This change will enshrine in statute the protections contained in Article I, Section 9m of the Wisconsin Constitution.

2. Guarantee to crime victims that they will not have any personally identifying information used by a public official, employee or agency for the purpose of attempting to obtain a personal benefit or financial gain by the official, employee or agency.

When a crime victim provides personal information to a public official for the purposes of the victim’s participation in the criminal justice process, the victim has a right to expect that this information will not be used inappropriately.

3. Give standing to crime victims to exercise and assert in court his or her rights as a crime victim under the statutes or under article I, section 9m of the Wisconsin constitution. A crime victim, a victim's legal representative, or upon a victim's request, a district attorney may represent the victim's interests in a proceeding or motion brought under this section.

This will allow victims to seek redress from the court handling the case in which a violation has occurred to mitigate further damage. Since the Crime Victims Rights Board (CVRB) was created, uncertainty has existed as to whether victims could only vindicate their rights through the CVRB process. Additionally, the CVRB process may take too long for the victim's rights to be effectively restored. After receiving yesterday's memo from the Wisconsin District Attorney's Association regarding one element of this provision, I appreciated the opportunity to speak at length with WDAA Board Member Pat Kenney and am confident that their concerns will be fully addressed by alternate language without affecting the intent of this provision.

This bill will strengthen the enforceable rights of all crime victims, re-establish and preserve the intentions of the Crime Victims Rights Amendment, and encourage victims and witnesses to report criminal behavior and reprehensible treatment and obtain deserved justice. Such actions are critical if we are to correct the deficiencies of current statutory protections and hopefully avoid the silence or re-victimization which are the all-too-often result of crime victim mistreatment.

Thank you for your consideration, and I welcome any questions you may have.

Testimony



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To: Members of the Assembly Committee on Criminal Justice and Corrections
From: Tony Gibart, Policy Coordinator, 608-255-0539 ext 310, tonyg@wcadv.org
Re: Assembly Bill 232 – Strengthening Crime Victim Rights in Wisconsin

Chairman Bies and Members of the Committee, thank you for the opportunity to provide testimony in support of Assembly Bill 232. This is an important and needed piece of legislation that will improve the ability of crime victims in Wisconsin to assert their rights. This bill will restore the meaning of Wisconsin's state constitution, which guarantees crime victims the right to be treated with "fairness, dignity and respect for their privacy." I want to thank Representative Jacque and Senator Wanggaard for authoring this bill and Chairman Bies and Representative Theisfeldt for co-sponsoring the proposal.

My name is Tony Gibart, and I am with the Wisconsin Coalition Against Domestic Violence (WCADV). WCADV is the statewide membership organization that represents local domestic violence victim service providers and survivors in Wisconsin. Our members work with and advocate for domestic violence victims in all of Wisconsin's 72 counties and 11 tribes.

Every day, our members accompany domestic violence victims into courtrooms across the state, as victims undertake the courageous act of facing their perpetrators in court and bringing them to justice. I am happy to say that in most cases victims are treated fairly by the system and by public officials. Indeed, most public servants do the right thing and are in their business to help victims and uphold the public trust. But in some cases, victims and their families encounter officials who do not treat them appropriately. This fact has been long recognized in Wisconsin.

Wisconsin was the first state in the country to enact a crime victim bill of rights. Later, in 1993, the state constitution was amended to guarantee crime victims the right "to be treated with fairness, dignity and respect for their privacy," along with nine other enumerated rights. In the late-nineties, the Crime Victim Rights Board was created to hear complaints alleging violations of crime victim rights, contained in statute and in the constitution, and provide guidance to the criminal justice system on best practices related to the treatment of victims. When violations occur, the Board may reprimand officials and take other actions, like refer the matter to the Judicial Commission. The Board is composed of representatives from law enforcement, the district attorneys association, victim/witness professionals and two citizen members. The Board cannot hear complaints until an informal mediation process has been completed and unless probable cause has been found.

The core purpose of this bill is to restore the availability of a remedy when victims' rights have been violated. Because of a 2005 Wisconsin Supreme Court case, *Crime Victim Rights Board v. Shilling*, victims in Wisconsin have no way of enforcing the particular right to be treated with "fairness, dignity and respect for their privacy." In that case, the Court decided that the right to be treated with fairness, dignity and respect for privacy was a statement of policy, and because that particular language was not present in statute, the Crime Victims Rights Board could not act. This bill corrects the *Shilling* decision so that the will of the legislature and voters who enacted the constitutional amendment is upheld.

We know when defendants' constitutional rights are violated, they have a remedy. In many cases, a conviction is thrown out or crucial incriminating evidence is suppressed. While these results are often necessary to protect core constitutional principles, they cause much pain and grief for victims and their families. It is only just and appropriate that victims too have a remedy when their rights are violated.

The limitations of the current power of the Crime Victims Rights Board were unfortunately displayed during the Ken Kratz case. As many of you know, last year, then-District Attorney Ken Kratz sent many sexually harassing text messages to a domestic violence victim whose case he was prosecuting. When the public asked why the Crime Victim Rights Board had not acted in the case, counsel for the Board pointed out that since the *Shilling* decision the Board had no authority to condemn even this gross mistreatment. Clearly, AB 232 is necessary to return Wisconsin to its place as leader in protecting crime victim rights.

The bill also provides victims with access to the courts, independent of the option to bring a case to the Crime Victims Rights Board. In some cases, the need to correct a violation of a crime victim right is immediate and the Crime Victim Rights Board may not be an effective venue. For example, if the victim has not been allowed to make statement at sentencing, a failure to correct the violation in timely fashion may mean the right is lost forever. At least four other states have provided statutory authority for the victim to seek immediate redress in court while the case is pending.¹

Additionally, the bill creates the right that the public officials not use victims' personal information for the purposes of obtaining a personal benefit or financial gain. This provision gets at a particular aspect of the Ken Kratz case that was disturbing.

Again, I want to thank the authors and sponsors of this legislation. The criminal justice system is in part about giving a voice to victims. When that system does not function correctly because of the misconduct of an official, victims are left without a voice and the injustice multiplies. The crime victim rights laws in our state are on the books to address and prevent this type of re-victimization. AB 232 brings Wisconsin back to that goal. The bill is about restoring the fundamental principle enshrined in our constitution: that victims are to be treated with fairness, dignity and respect. I urge you to support this proposal. At this point, I would be happy to answer any questions.

¹ ARIZ. REV. STAT. § 13-4437; FLA. STAT. § 960.001; IND. CODE ANN. § 35-40-2-1; TEX. CONST. ART. I, § 30

My name is Steve Derene and I am appearing in favor of Assembly Bill 232. Although I am currently employed by a national non-profit organization that represents state victim assistance agencies, I am appearing today in my private capacity as a Wisconsin resident. For most of my professional career from 1976 to 2001, I worked in several capacities in the Wisconsin Department of Justice, where, among other things, I worked on the development and implementation of state criminal justice and crime victim-related legislation and programs. Among the specific crime victim legislation I worked on were the enactment in 1980 of Chapter 950, Wisconsin's Bill of Rights for Victims and Witnesses of Crime, the 1993 adoption of Article 1, section 9m of the Wisconsin Constitution establishing fundamental rights for crime victims and, in 1998, Act 181 which was a comprehensive revision of Chapter 950. I have also been involved in a variety of roles at the national level, including serving as an expert-consultant to the U.S. Justice Department's Office for Victims of Crime.

In my view, AB 232 makes some simple, yet very important, changes to the enforcement of crime victims' rights in Wisconsin. In 1980, Wisconsin became the first state in the nation to statutorily recognize rights for victims and witnesses of crime. While we should be proud of that distinction, being the first has some drawbacks; primarily the fact that there were no models to follow or lessons to learn from other states' experiences. "Victims' rights" in Wisconsin were literally unenforceable. We often referred to them as a "Bill of Good Intentions," as "mere poetry" or as "gummy laws," since they had no teeth. While we offered an incentive of substantial state reimbursement for county victim-witness assistance programs, there were no sanctions or consequences for failure to afford crime victims their rights as set forth in the statutes. I believe the state did a very good job of encouraging counties to begin

victim-witness assistance programs to help victims navigate the criminal justice system—and nearly all counties eventually started programs—those programs, by themselves, could not ensure that all crime victims were afforded their rights.

That began to change in 1993 when Wisconsin—with an 84 percent favorable referendum vote—joined 13 other states by amending our Constitution to recognize that victims are entitled to fundamental rights. (Thirty-three states now have victims' rights provisions in their constitutions.) While adoption of the amendment was very significant, it did not, in my view, produce dramatic changes overnight. Indeed, all but one of the specific provisions in the amendment was already addressed by statute. And we wanted to make certain that implementation would be workable for both victims and the criminal justice system. After five years' experience with the amendment, a committee of the advisory Crime Victims' Council put together a comprehensive draft revision that the Legislature eventually enacted as Act 181. I think it's important to note that the drafting committee included a judge, a prosecutor, a law enforcement official, victim-witness assistance coordinators and crime victims, underscoring the breadth of input and perspectives reflected in the revised statute.

One very critical provision of the constitutional amendment was language requiring the Legislature to provide remedies for violations. It was that mandate that led to the creation of the Crime Victims Rights Board. While a number of other states have taken different approaches to seeking compliance with victims' rights, Wisconsin is the only state that has created a formal, quasi-judicial, regulatory body to review and act upon complaints of victims' rights violations. And while the Board serves a very important function, it is not a complete,

timely or fully satisfactory solution to ensuring that victims' rights are addressed in a prompt or responsive manner, as contemplated by the Constitution.

Indeed, one glaring deficiency, as later determined by the state Supreme Court in the *Schilling* case, is the Board's inability to act in cases in which crime victims are not treated, using the Constitution's words, "with fairness, dignity and respect for their privacy." Such treatment is certainly fundamental to the specific rights enumerated in the Constitution. But, although the Court recognized that "according crime victims fairness, dignity and respect is very important to a just enforcement of the criminal code," the Court held that this language is merely a statement of purpose that describes the policies to be promoted by the State but does not provide an enforceable, self-executing right" (*Schilling v. State Crime Victims Rights Board*, 692 N.W.2d 623, 631 (Wis. 2005)). In other words, the Court was telling the Legislature it must enact a statutory counterpart to enforce this basic constitutional provision. AB-232 will do that.

While the Board does carry out a very important function, I do not believe it is necessarily the best—or only—recourse for crime victims. The state Constitution requires the Legislature to provide **remedies** for violations of crime victims' constitutional rights. However, it appears to me that—with one theoretical exception—the Board's powers are not really remedial, in the sense they can prevent or correct a violation; they are, for the most part, after-the-fact punitive measures or sanctions, such as public or private reprimands, referral to the Judicial Commission, and potentially bringing an action seeking a civil forfeiture for intentional violations.

The only possible route for the Board to affirmatively protect a victim's right is its authority to seek equitable relief on behalf of a crime victim. However, given the statutory

constraints on the Board and the quasi-judicial (or perhaps, more accurately, quasi-criminal justice) process it must follow, it would be nearly impossible for the Board to take such action in a timeframe that could realistically be of much help to a crime victim. In many instances, the timeliness of seeking relief in the course of an ongoing criminal proceeding can be critical to affording a truly effective remedy.

Before filing a complaint with the Board, crime victims utilize the Justice Department's Victim Resource Center's informal mediation process. The Resource Center has proven itself to be an extremely valuable avenue to resolve problems, answer questions and advocate on behalf of crime victims. The experience in Wisconsin and other states shows that a large portion of the problems faced by crime victims do not necessarily involve a violation of a formal right, but involve a lack of understanding of the criminal justice system or failure of communications with criminal justice officials. The Resource Center can frequently address these problems for victims but the Resource Center has no formal authority to resolve complaints; but it is a required preliminary step before a victim can even file a complaint with the Board.

By statute, only after the Resource Center has finished its actions may a victim file a formal complaint with the Board. The Board is then required to first find probable cause that a violation occurred; it may conduct investigations, hold hearings and issue findings of fact and then render a decision. A rehearing can be requested and the Board's decision ultimately appealed to circuit court. It would only be after all these avenues are exhausted that, if the Board were to decide it should seek equitable relief on behalf of a crime victim, that the Board could actually do so. By that time, it is highly unlikely that any relief would be of much help or

value to the crime victim. It is my understanding that the Board has never, in fact, sought equitable relief on behalf of a crime victim.

For those reasons, the provision of AB-232 that recognizes a victims' right, independent of the Board, to assert their constitutional and statutory rights is extremely important and, in my opinion, helps fulfill the Constitution's mandate that the Legislature provide remedies for violations and why I encourage the Legislature to enact this bill.



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TO: Chairman Bies and Members of the Assembly Committee on Criminal Justice and Corrections

FROM: Dean Stensberg
Director of Public Affairs and Policy
Office of the Attorney General
Wisconsin Department of Justice

DATE: 8 August 2011

RE: Assembly Bill 232

Assembly Bill 232 seeks to remedy perceived shortcomings in Section 950 of Wisconsin law which codifies victims' rights pursuant to the Wisconsin Constitution. It further provides for the assertion of these rights.

This memorandum is provided for your information as you further consider these changes to current law and the Committee's executive action on the bill.

The current draft makes three significant changes to current law.

- The bill provides for *Treatment of Victims* language changes which will enumerate rights in statute consistent with the Wisconsin Constitution.
- The bill explicitly prohibits the use of a victim's personal information for a public official's personal benefit or financial gain.
- The bill creates standing for victims to enforce their rights.

The Department is supportive of these clarifications in law and the establishment of standing for victims to enforce their rights or seek relief for alleged violations. The following recommends improvements to the current draft, with supporting rationale.

- I. In the *Treatment of Victim's* section, the bill's current draft language goes beyond the constitutional language and unnecessarily includes already prohibited conduct (i.e., intimidation, harassment, discrimination and abuse). Inclusion of these behaviors in this section may have the effect of further confusing the rights established by the Constitution.

The Department recommends the following revision if it is the legislature's intent to codify constitutional language in statute:

950.04(1v)(ag) is created to read: To be treated with fairness, dignity and respect for their privacy.

- II. In the section of AB 232 making the use of a victim's personal information for personal use or financial gain an explicit violation of victim's rights, it may be desirable to address not just improper use but also improper disclosure of victim information.

More succinct, consistent, and statutorily compatible language in terms and definitions may further improve the draft.

"Personally identifiable information" is currently defined by statute to include a wide range of information of a scope that is larger than may be necessary or desirable to meet the stated intent of this provision. (Those definitions follow below.)

Wis. Stat. 19.62(5) "Personally identifiable information" means information that can be associated with a particular individual through one or more identifiers or other information or circumstances.

To protect victim privacy, we recommend restricting the use of "personal identifiers". "Personal identifier" means a social security number, telephone number, street name and number, electronic mail address, or post-office box number. Wis. Stat. § 85.103(1).

The Department recommends the following revisions:

1. *Create 950.02 (3r): Personal identifier has the meaning given in § 85.103(1)*
2. *950.04(1v)(dr) is created to read: To not have his or her personal identifiers used or disclosed by a public official, employee or agency for any purpose other than as necessary to carry out the statutory function of an agency or office or as required by law.*
3. Insert similar language in 950.04 (2w) Rights of Witnesses

The Department supports AB 232's establishment of standing for victims to assert their rights or seek enforcement by a court during the pendency of a matter.

- III. However, the language in the current draft of the bill may create confusion about the role of the Crime Victims Rights Board (CVRB) under current law. Under current law, the board does not assert its own "rights and duties". Instead, it may act only upon request and according to the authority conferred by the statute. It may also decline to act. Removing the reference to the CVRB in this section may eliminate this confusion.
- IV. The section's heading of "*Enforcement*" may create further confusion. That term is not used in the sections that describe the current enforcement mechanisms (DOJ Mediation and

CVRB).

The Department also has concerns about AB 232's authorization of district attorneys to represent victims. One likely subject of any alleged violation is a district attorney or an assistant district attorney. This may create an irreconcilable conflict between prosecutors and victims and their assertion of rights. It is further likely to create unmet or disappointed expectations for victims seeking to assert their rights, if a district attorney exercises his or her discretion not to bring an action. While simply requiring this duty of district attorneys may resolve any expectation confusion, it exacerbates attorney-client conflicts.

A district attorney's representation of a victim may, in some circumstances, also create a conflict with the district attorney's obligation to represent the State of Wisconsin under the rules of professional responsibility for attorneys (SCR Chapter 20). Conferring victim standing to assert certain rights does not, and cannot, confer a further right to the victim to direct criminal prosecution.

District attorneys can best address the issues of workload and the expected result of the bill's enactment in its current form on the potential for further filings, case and action reviews, complaint analysis and response and/or action, and endemic complications with complaining witnesses seeking to assert their constitutional victims' rights. The Department recommends that the singular establishment of standing for crime victims provides sufficient ability to victims to assert their rights.

The Department recommends the following revisions:

950.105 of the statutes is created to read:

950.105 Standing. A crime victim has a right to exercise and assert in any court his or her rights as a crime victim under the statutes or under article I, section 9m of the Wisconsin constitution. This section does not preclude a district attorney from asserting a victim's interests or their statutory or constitutional rights in a criminal case or in a proceeding or motion brought under this section.

The Department and I remain available to further discuss these recommendations.

